Supreme Court, U.S.
FILED
JUL 3 1995

(2)

No. 94-1802

In the Supreme Court of the United States

OCTOBER TERM, 1995

HOSPITAL SAN RAFAEL, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, on the record in this case, the petitioner Centro Medico del Turabo, Inc., was correctly found to be the alter ego of petitioner Hospital San Rafael, Inc., regardless of whether Centro Medico was created for the purpose of evading Hospital San Rafael's labor law obligations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	26

TABLE OF AUTHORITIES

Cases:

A. Dariano & Sons, Inc. v. *District Council of Painters No. 33*, 869 F.2d 514 (9th Cir. 1989)	23, 24
Alkire v. *NLRB*, 716 F.2d 1014 (4th Cir. 1983)	25
Asseo v. *Centro Medico Del Turabo, Inc.*, 900 F.2d 445 (1st Cir. 1990)	5
C.E.K. Industrial Mechanical Contractors, Inc. v. *NLRB*, 921 F.2d 350 (1st Cir. 1990)	14
Campbell-Harris Electric, Inc., 263 N.L.R.B. 1143, enforced, 719 F.2d 292 (8th Cir. 1983)	14
Carpenters Local 1846 v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983)	17
Crest Tankers, Inc. v. *National Maritime Union*, 796 F.2d 234 (8th Cir. 1986)	22
Crest Tankers, Inc. v. *National Maritime Union*, 665 F. Supp. 1431 (E.D. Mo. 1987), appeal dismissed, 871 F.2d 1092 (8th Cir. 1988)	22
E.G. Sprinkler Corp., 268 N.L.R.B. 1241 (1984), aff'd *sub nom. Goodman Piping Products, Inc.* v. *NLRB*, 741 F.2d 10 (2d Cir. 1984)	14
Esmark, Inc. v. *NLRB*, 887 F.2d 739 (7th Cir. 1989)	20, 21
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987)	18
Fugazy Continental Corp., 265 N.L.R.B. 1301 (1982), enforced, 725 F.2d 1416 (D.C. Cir. 1984)	5, 13

Cases—Continued: Page

Fugazy Continental Corp. v. *NLRB*, 725 F.2d 1416 (D.C. Cir. 1984) 17
Gartner-Harf Co., 308 N.L.R.B. 531 (1992) 15
Golden State Bottling Co. v. *NLRB*, 414 U.S. 168 (1973) 18
Goodman Piping Products, Inc. v. *NLRB*, 741 F.2d 10 (2d Cir. 1984) 17
Haley & Haley, Inc. v. *NLRB*, 880 F.2d 1147 (9th Cir. 1989) 24
Howard Johnson Co. v. *Detroit Local Joint Executive Board*, 417 U.S. 249 (1974) 13, 18
International Union of Operating Engineers, Local 150 v. *Centor Contractors, Inc.*, 831 F.2d 1309 (7th Cir. 1987) 19
Iowa Express Distribution, Inc. v. *NLRB*, 739 F.2d 1305 (8th Cir.), cert. denied, 469 U.S. 1088 (1984) 23
J.M. Tanaka Construction, Inc. v. *NLRB*, 675 F.2d 1029 (9th Cir. 1982) 24, 25
Johnstown Corp., 313 N.L.R.B. 170 (1993), enforced *sub nom. Stardyne, Inc.* v. *NLRB*, 41 F.3d 141 (3d Cir. 1994) 14, 15
Leslie Oldsmobile, Inc., 276 N.L.R.B. 1314 (1985) .. 14
NLRB v. *Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986) 17
NLRB v. *Bell Co.*, 561 F.2d 1264 (7th Cir. 1977) .. 21
NLRB v. *Burns International Security Services*, 406 U.S. 272 (1972) 17, 18
NLRB v. *Campbell-Harris Electric, Inc.*, 719 F.2d 292 (8th Cir. 1983) 22
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 16, 21
NLRB v. *Dane County Dairy*, 795 F.2d 1313 (7th Cir. 1986) 21
NLRB v. *Lantz*, 607 F.2d 290 (9th Cir. 1979) 14
NLRB v. *McAllister Brothers, Inc.*, 819 F.2d 439 (1987) 25
NLRB v. *O'Neill*, 965 F.2d 1522 (9th Cir. 1992), cert. denied, 113 S. Ct. 2995 (1993) 24
NLRB v. *Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960) 21, 23

Cases—Continued: Page

NLRB v. *Tricor Products, Inc.*, 636 F.2d 266 (10th Cir. 1980) 17
Radio Union v. *Broadcast Service*, 380 U.S. 255 (1965) 14
Southport Petroleum Co. v. *NLRB*, 315 U.S. 100 (1942) 13
South Prairie Construction Co. v. *Local 627 Operating Engineers*, 425 U.S. 800 (1976) 14
Stardyne, Inc. v. *NLRB*, 41 F.3d 141 (3d Cir. 1994) 15, 16, 17
Tricor Products, Inc., 239 N.L.R.B. 65 (1978), enforced, 636 F.2d 266 (10th Cir. 1980) 14
Trustees of Pension, Welfare & Fringe Vacation Benefit Funds of IBEW Local 701 v. *Favia Electric Co.*, 995 F.2d 785 (7th Cir. 1993) 19, 21
UA Local 343 v. *Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir. 1994) 23, 24
Woodline Motor Freight, Inc. v. *NLRB*, 843 F.2d 285 (8th Cir. 1988) 22

Statutes:

Labor Management Relations Act, § 301, 29 U.S.C. 185 21
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 9, 10
§ 8(a)(3), 29 U.S.C. 158(a)(3) 9, 10
§ 8(a)(5), 29 U.S.C. 158(a)(5) 10
§ 10(j), 29 U.S.C. 160(j) 4

Miscellaneous:

S. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 Wisc. L. Rev. 67 25
Note, 86 Mich. L. Rev. 1024 (1988) 25
Note, 54 N.Y.U. L. Rev. 624 (1979) 25
F. Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 Minn. L. Rev. 105 (1973) 25-26

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1802

HOSPITAL SAN RAFAEL, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 42 F.3d 45. The decision and order of the National Labor Relations Board (Pet. App. 15a-35a), and the decision of the administrative law judge (Pet. App. 36a-125a), are reported at 308 N.L.R.B. 605. The Board's order amending its decision and order (Pet. App. 126a-132a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1994. A petition for rehearing was denied on February 1, 1995. Pet. App. 133a-134a.

The petition for a writ of certiorari was filed on May 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Hospital San Rafael, Inc. (HSR) was established in 1933 as a neighborhood hospital in Caguas, Puerto Rico. In 1978, doctors Jaime Soler and Jose Badillo purchased about 80 percent of HSR's stock, and hired Joaquin Rodriguez as its president. Pet. App. 2a, 54a. Soler, Badillo, and Rodriguez comprised HSR's board of directors. HSR was in poor financial condition, and in mid-1978, local health authorities informed HSR that, unless problems in the hospital's physical plant were remedied, HSR would lose its eligibility to treat Medicare patients. *Id.* at 2a. Because remedying the deficiencies in the hospital's physical plant would have required substantial demolition and reconstruction, Soler, Badillo, and Rodriguez decided instead to build a new hospital. *Id.* at 2a, 59a. In August 1978, petitioner Centro Medico del Turabo, Inc. (CMT) was created to operate the proposed new facility, Hospital Interamericano de Medicina Avanzada (HIMA),[1] because HSR itself was unable to secure necessary bank loans, and because HIMA was expected to serve a larger geographical area. *Id.* at 2a-3a, 60a. Soler owned 40 percent of CMT, and

[1] Petitioner Turabo Medical Center Limited Partnership (TMCLP) was established in 1980 to act as CMT's operating arm in the planning, financing, and construction of HIMA. Pet. App. 16a. TMCLP and HIMA are subsidiaries of CMT (*id.* at 66a), and, as petitioners note (Pet. 5 n.2), there is no legally relevant distinction among them for purposes of this case.

Badillo and Rodriguez each owned 20 percent. Rodriguez served as CMT's president, and Soler and Badillo were on the board of directors. *Id.* at 3a, 56a.

In January 1984, the Union [2] became the certified collective bargaining representative of HSR's professional and technical employees. HSR and the Union then negotiated a labor contract, effective from September 1, 1984, through August 31, 1987; the agreement explicitly provided that it would remain in effect until a new contract replaced it. Pet. App. 3a, 17a. In 1985, the chief union steward began to question HSR about the effect the planned new hospital, HIMA, would have upon job security. On August 30, 1985, Rodriguez issued a memorandum to HSR's employees, stating "on behalf of [HSR] and [CMT]" that the employees would be "transferred" to HIMA with the same salary and benefits. *Id.* at 4a.

In May 1987, the Union sought to begin negotiations for a new labor agreement to succeed the contract due to expire on August 31, 1987. The Union's proposals included a provision naming both HSR and CMT as parties to the contract. Pet. App. 4a, 76a. HSR responded that it regarded the Union's certification as covering HSR employees only, that HSR would not negotiate on behalf of CMT, and that HSR would not negotiate at all if the Union continued to seek CMT's inclusion in the new agreement. *Id.* at 76a.

An unfair labor practice charge was filed by the Union. The General Counsel of the National Labor Relations Board (Board) issued a complaint alleging

---

[2] Local 1199, Union Nacional de Trabajadores de la Salud, a/w National Union of Hospital and Health Care Employees, AFL-CIO.

that HSR and CMT were a single employer and alter egos, and that they had unlawfully refused to bargain with the Union. Pet. App. 4a. In May 1988, the Union reached separate settlement agreements with HSR and CMT. HSR agreed to negotiate in good faith with the Union; CMT agreed to retain 95 percent of HSR's employees when HIMA began operations, but CMT stipulated that it was not thereby agreeing to recognize the Union. *Id.* at 4a, 48a. In light of the settlements, the General Counsel withdrew the complaint, but reserved the right to reinstate it in the event of non-compliance. *Id.* at 49a.

HSR and the Union resumed negotiations for a new contract, but discussions broke down in September 1988 on the issue of the inclusion of CMT as a party. Pet. App. 49a. In October 1988, the Union filed a petition with the Board seeking to have the settlement agreements set aside and the complaint reinstated. *Id.* at 4a. HSR closed on November 14, 1988, and HIMA opened for business on November 19. *Id.* at 43a, 82a.

2. In December 1988, the Union filed unfair labor practice charges alleging that, since the date of the settlement agreements, HSR and CMT had failed to bargain in good faith and had unlawfully refused to hire five union activists at HIMA. Pet. App. 5a, 39a. In February 1989, the General Counsel issued a new complaint against HSR and CMT.[3]

a. After a hearing, an administrative law judge (ALJ) found that CMT was the alter ego of HSR. Pet. App. 5a, 70a. The ALJ explained that "[t]he

[3] The General Counsel also filed a petition in federal district court pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), seeking, among other things,

Board has generally found alter ego status where the two enterprises involved are found to have substantially identical management, business purposes, operations, equipment, customers, and supervision, as well as ownership." *Id.* at 67a. The ALJ added that "[a] further, and critical, consideration to the finding of alter ego status, is whether the new company was created 'to evade responsibilities under the Act.'" *Id.* at 68a (citing *Fugazy Continental Corp.*, 265 N.L.R.B. 1301 (1982)).

As to common ownership, the ALJ found that doctors Soler and Badillo, who owned 87 percent of the stock of HSR, owned about 60 percent of the stock of CMT. Pet. App. 68a. As to common management, the ALJ found that "[s]ince 1978 Joaquin Rodriguez has exercised executive control over both HSR and CMT." *Ibid.* The ALJ observed that Rodriguez was responsible for the creation of CMT in 1978; that he served as president and chief executive officer of both entities at all relevant times; and that "all policy is determined by him, or by him with his managers." *Id.* at 68a-69a. The ALJ further found that (1) at the "top" level of management, in addition to Rodriguez (president and CEO of both entities), Carlos Pineiro, the executive vice-president of HSR, became executive vice-president of CMT; (2) the

---

an injunction requiring CMT, as a legal successor to HSR, to recognize and bargain with the Union. On August 8, 1989, the district court issued a preliminary injunction, and the court of appeals affirmed. Pet. App. 5a; see *Asseo* v. *Centro Medico del Turabo, Inc.*, 900 F.2d 445 (1st Cir. 1990). On December 15, 1989, the General Counsel issued a further complaint alleging that, despite the injunction, CMT had continued to refuse to bargain with the Union for a period of about two months. Pet. App. 42a.

managers at "[t]he next level of management" at HSR assumed similar positions at CMT; and (3) at the "lower level" of management, roughly 85 of 102 supervisors and department heads at HSR moved to the new hospital. *Id.* at 64a-65a, 69a.

The ALJ further found that HSR and CMT shared "a common business purpose and customer base." Pet. App. 69a. The ALJ noted that both hospitals were located in the same city and the new hospital was "built and designed to serve the same, maybe a somewhat larger[,] area." *Ibid.* "The type of service and the area in which it is performed remain basically the same" at CMT, the ALJ explained; that the new hospital "is larger, more elaborate, more modern and better equipped," he observed, "makes a difference in degree, but not in kind, of the services offered." *Id.* at 69a & n.28.

The ALJ also found it significant that "Rodriguez, Soler and Badillo, among themselves, as directors of both [HSR and CMT], viewed HSR and CMT as a single entity for purposes of internal dealings." Pet. App. 62a. For example, the ALJ found that, in February 1982, HSR's board of directors passed a resolution that stated that HSR was "taking all steps regarding the construction of new facilities which would be the [CMT] project." *Ibid.* The resolution warned that any physician practicing at HSR who promoted a competing group's plan to build a new hospital would be deemed to be engaged in activity "harmful to the best interests of [HSR]," which could result in the loss of hospital privileges at HSR. *Ibid.* The ALJ observed that, between 1982 and 1987, HSR's annual financial statements characterized CMT as a "related party" of HSR. *Ibid.* Moreover, CMT owed HSR large sums of money through-

out that period and thereafter, on which neither interest nor principal was ever paid. *Id.* at 62a-63a. The ALJ found that, as of March 30, 1989, CMT owed HSR a total of more than $41 million, including $1 million which CMT had agreed to pay HSR for its operating license, but that "there is no evidence that any money was actually paid." *Id.* at 63a.[4]

Despite all of the foregoing evidence, the ALJ found that "CMT continuously and adamantly refused to admit its relationship with HSR to the Union." Pet. App. 69a. In the ALJ's view, "[HSR and CMT] knew, or reasonably should have known what the legal effect of that relationship was and is." *Id.* at 70a. "To continue to insist that these two corporations are, in effect, strangers to each other," the ALJ stated, "leads me to the conclusion that the new company, even though it may have been created initially in order to avoid the credit problems encumbering HSR, became a device to evade responsi-

---

[4] The ALJ also found it significant that "[w]hen communicating with a local bank an impression was given that HSR and the new hospital projects were part of the same enterprise." Pet. App. 63a. For example, in an August 1981 letter to the Banco de Ponce, Rodriguez stated that "[HSR] is going through a major expansion of its facilities. It will become [CMT] and it will be housed in a most modern and sophisticated medical facility to be constructed in Caguas." *Id.* at 64a. Similarly, in February 1982, Rodriguez, in a letter to the same bank, described a plan to "[t]ransfer [HSR's] physical asset[s] to a corporation which is able to develop it when the Hospital is transferred to [CMT]." *Ibid.* (emphasis omitted). The ALJ also noted that, in 1983 and 1984, articles written by Rodriguez appeared in HSR's employee newsletter that "[spoke] of the new hospital in terms of 'we' or ['] us[']" and identif[ied] the new construction with the existing structure and its employees." *Id.* at 63a.

bilities under the [National Labor Relations] Act." *Ibid.* (footnote and internal quotation marks omitted).

b. The ALJ also found that HSR and CMT constituted a "single employer" for purposes of the Act. Pet. App. 70a. The ALJ explained that "[t]he question in the 'single employer' situation is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise." *Id.* at 67a (citation omitted). In addition to commonality of ownership and management between HSR and CMT (see pp. 5-6, *supra*), the ALJ found that responsibility for establishing labor-relations policy at both entities was vested in executive vice-president Pineiro. *Id.* at 66a. The ALJ also pointed out that, while "[t]he operations of the two hospitals were not interrelated in the sense that they functioned as a team," CMT "purchase[d] equipment from HSR, and * * * equipment was transferred to [CMT] along with management, administrators, professional, technical and nonprofessional employees * * * on account of the discontinuance of operations by [HSR], and assumption of operations by [CMT]." *Id.* at 69a. In that regard, the ALJ noted that "the fact that these two companies were not actual employers at the same time does not affect the conclusion that they are a single employer." *Id.* at 70a n.31.[5]

c. In light of the ALJ's alter ego and single employer findings, the ALJ concluded that the May 1988 settlement agreement between the Union and HSR had to be set aside. Pet. App. 53a. The ALJ

---

[5] The ALJ also found that CMT was a legal successor to HSR, and therefore was obligated to recognize and bargain with the Union at the new hospital. Pet. App. 71a-73a. The Board, however, did not reach that issue. *Id.* at 18a-19a.

explained that, because HSR and CMT "knew, or should have known[,] that they constituted a single employer and alter egos within the meaning of the Act[,] * * * [i]t follows that an agreement by HSR to bargain in good faith with the Union would necessarily include a commitment to bargain on behalf of CMT on the question of the preamble, i.e., who was to be named as an employer in the negotiations, and about the coverage and the term of the collective-bargaining agreement under consideration." *Id.* at 52a-53a. The ALJ concluded that, "by refusing * * * to bargain further because of the Union's insistence on the inclusion of CMT as a Party Employer, HSR has shown that it never had any intention of bargaining in good faith on that issue or of complying with that provision of the settlement agreement." *Id.* at 53a.[6]

3. The Board affirmed the ALJ's findings that HSR and CMT constituted a single employer and were alter egos. Pet. App. 18a. In sustaining the ALJ's single employer finding, the Board disagreed with the ALJ's conclusion that HSR and CMT were not "actual employers at the same time." *Id.* at 8a n.2. Rather, the Board observed that "[i]n mid-1988, CMT began its hiring process for HIMA employees

---

[6] The ALJ also found that CMT violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by refusing to rehire four HSR employees at the new hospital because of their union activities. Pet. App. 84a-102a, 114a-115a. The Board agreed with the ALJ's findings as to those four employees and found, in addition, that CMT had unlawfully denied a fifth HSR employee employment at the new hospital. *Id.* at 21a-26a. The court of appeals sustained those findings as supported by "ample evidence" (*id.* at 13a), and petitioners do not challenge that aspect of the court's decision (Pet. 12 n.8).

by distributing job applications and by interviewing and screening prospective applicants." *Ibid.* Therefore, the Board concluded, "CMT was in existence and operating over a significant period of time before HSR officially closed for business on November 14, 1988." *Ibid.*

Like the ALJ, the Board (with one member dissenting) determined that setting aside the settlement agreement between HSR and the Union was warranted in light of the alter ego and single employer findings. Pet. App. 18a. The Board concluded, *inter alia*, that HSR and CMT violated Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(1), (3), and (5), by unilaterally changing the employees' terms and conditions of employment at the new hospital without bargaining with the Union. Pet. App. 27a. Accordingly, the Board ordered petitioners to honor the terms of the 1984 labor agreement pending the negotiation of a new contract, or until the parties reach a valid impasse in bargaining for a new contract. *Id.* at 128a.

4. The court of appeals enforced the Board's order. Pet. App. 1a-14a.

a. The court explained that, in analyzing whether one employer is an alter ego of another, "[m]otive matters * * * because a corporate transfer or transformation for the *purpose* of avoiding labor law obligations is an unsympathetic case for respecting the formal alteration, and faced with a subterfuge * * * the courts reasonably need give less weight to the other 'identity' criteria." Pet. App. 8a-9a. However, the court rejected the contention that such an improper motive is always required for a finding of alter ego status. *Id.* at 9a-10a. The court explained

that, "if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an existing collective bargaining agreement." *Ibid.*

On the facts of this case, the court upheld the Board's alter ego finding as being "within reasonable limits," for "a substantial * * * identity exists between the two hospitals along every axis: ownership, senior management, supervisory management, employee base, geographic location and basic business function." Pet. App. 11a. Although "the decision of [HSR's] owners to establish a new hospital occurred for financial and operational reasons that have nothing to do with labor relations," *id.* at 9a,[7] that fact was not controlling under the court of appeals' analysis.

The court of appeals disagreed with the Board's single employer finding, stating that "[t]he single employer doctrine * * * seems to have little application to this case—which does not involve two ongoing businesses coordinated by a common master." Pet. App. 7a-8a. But "[i]n all events," the court concluded, "the Board's order here in dispute can be sustained on the alter ego theory." *Id.* at 7a.

b. Although the court sustained the Board's alter ego finding, it found "unpersuasive" the Board's

---

[7] In the court's view, "[t]he Board's claim that [CMT's] 'purpose' was not improper at the outset but became improper simply because [CMT] declined to bargain makes little sense in the context of the alter ego doctrine," for "*if* the two companies were not alter egos, [CMT's] desire to resist obligations or liabilities of [HSR] would be understandable." Pet. App. 9a.

decision to set aside the May 1988 settlement agreement between HSR and the Union and found, further, that "no other evidence shows that the agreement was entered into in bad faith." Pet. App. 12a. However, the court observed that "there is no showing by the hospitals that the setting aside of the settlement agreement had any effect on the Board's other determinations or on any of the provisions of its remedial order." *Ibid.* Accordingly, the court enforced the Board's order "as written." *Id.* at 14a.

ARGUMENT

In a case on remand from a decision of another circuit, the Board is currently considering the nature of the alter ego doctrine and its relation to the single employer doctrine. Further review of the question petitioners present would therefore not be warranted at this time. In any event, the decision of the court of appeals is correct, and there is no conflict of decisions among the circuits requiring resolution by this Court. Accordingly, the petition should be denied.

1. The basic issue in this case is whether the Board was warranted in treating HSR and CMT as one entity. Since the only collective bargaining agreement is between the Union and HSR, CMT is required to respect that agreement only if it is an extension of HSR. There are two different, but related, labor law doctrines under which two nominally distinct entities may be found to be one—the "alter ego" and the "single employer" doctrines.

As this Court has explained, an alter ego relationship exists between two nominally different employers where there has been "a mere technical

change in the structure and identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *Howard Johnson Co.* v. *Detroit Local Joint Executive Board*, 417 U.S. 249, 259 n.5 (1974). In those circumstances, one employer may be treated, for purposes of the Act, as a "disguised continuance" of the other. *Ibid.* (quoting *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942)). Consistent with the Court's teaching that an intent to evade legal obligations is "frequently" (but not necessarily) a feature of the alter ego relationship, the Board has explained that, to determine whether one nominally different employer is the alter ego of another employer:

> [W]e must consider a number of factors, no one of which, taken alone, is the *sine qua non* of *alter ego* status. Among these factors are: common management and ownership; common business purpose, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same market"; as well as the nature and extent of the negotiations and formalities surrounding the transaction. We must also consider whether the purpose behind the creation of the alleged *alter ego* was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.

Fugazy Continental Corp., 265 N.L.R.B. 1301, 1301-1302 (1982) (footnotes omitted), enforced, 725 F.2d 1416 (D.C. Cir. 1984). The Board, with court approval, has found the existence of alter ego relation-

ships in the absence of an intent to evade labor law obligations.[8]

Under the "single employer" doctrine, which "has its primary office in the case of two ongoing businesses" that constitute an integrated operation, "[m]ost of the alter ego criteria remain relevant but motive is normally considered irrelevant." Pet. App. 7a. Under that doctrine, two businesses, though nominally distinct, are treated as a unitary enterprise for purposes of the Act where there is interrelation of operations, common management, centralized control of labor relations, and common ownership. *Radio Union* v. *Broadcast Service*, 380 U.S. 255, 256 (1965). If the respective workforces of a unionized firm and a nonunion firm, when merged, would constitute an appropriate bargaining unit, then the unionized firm's labor contract applies, by operation of law, to the nonunion firm. See *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800 (1976); *C.E.K. Industrial Mechanical Contractors, Inc.* v. *NLRB*, 921 F.2d 350, 353-354 (1st Cir. 1990); *NLRB* v. *Lantz*, 607 F.2d 290, 295-298 (9th Cir. 1979).

As the court of appeals noted (Pet. App. 7a), the line of demarcation between the alter ego and single

---

[8] See *Johnstown Corp.*, 313 N.L.R.B. 170, 171 (1993), enforced *sub nom. Stardyne, Inc.* v. *NLRB*, 41 F.3d 141 (3d Cir. 1994); *Tricor Products, Inc.*, 239 N.L.R.B. 65, 69 (1978), enforced, 636 F.2d 266 (10th Cir. 1980); *Campbell-Harris Electric, Inc.*, 263 N.L.R.B. 1143, 1148-1149, enforced, 719 F.2d 292 (8th Cir. 1983); *E.G. Sprinkler Corp.*, 268 N.L.R.B. 1241, 1243-1244, aff'd *sub nom. Goodman Piping Products, Inc.* v. *NLRB*, 741 F.2d 10 (2d Cir. 1984); *Leslie Oldsmobile, Inc.*, 276 N.L.R.B. 1314, 1315-1317 (1985).

employer doctrines is not neatly drawn in the decisions of the Board and of the courts. That lack of clarity is exemplified in *Stardyne, Inc.* v. *NLRB*, 41 F.3d 141 (3d Cir. 1994). There, the ALJ found that the entities involved did not constitute a single employer, but that they were alter egos; the Board, without disturbing the ALJ's finding as to lack of single employer status, affirmed the alter ego finding. See *Johnstown Corp.*, 313 N.L.R.B. 170 (1993). On review, the Third Circuit sustained the Board's position that unlawful intent is not a necessary prerequisite of alter ego status and, further, affirmed the Board's alter ego finding as supported by substantial evidence. *Stardyne*, 41 F.3d at 146-152. Nevertheless, the court remanded the case to the Board for further proceedings. *Id.* at 154. The court pointed out that, in *Gartner-Harf Co.*, 308 N.L.R.B. 531, 533 n.8 (1992), the Board had indicated that the alter ego doctrine "is in effect a subset of the single employer concept"; however, if that were true, the court observed, then the entities in *Stardyne* could not be alter egos, since the ALJ found they were not a single employer. 41 F.3d at 153. Although the court was "unsure why the alter ego [doctrine] should be regarded as a subset of the single employer doctrine" (*id.* at 152), it remanded the proceeding to the Board "so that it can reconcile the contradictory case law that it has developed" (*id.* at 153). The Board has accepted the court's remand, and the matter is currently pending before the Board.

Given the present lack of clarity in Board law as to the relationship between the alter ego and single employer doctrines, and in light of the fact that the proper contours of the alter ego doctrine

can be better understood in the context of its relationship to the single employer doctrine, we believe (contrary to petitioners, see Pet. 12 n.9) that the Court would be materially assisted, in considering whether unlawful intent is required for an alter ego finding, if it had the benefit of the Board's views on the questions raised by the court of appeals' remand in *Stardyne*. Accordingly, we submit that the issue that petitioners seek to present is not ripe for review by this Court.

2. The Board's position that unlawful intent is not a prerequisite for an alter ego finding is a reasonable interpretation of the Act, and thus should be sustained by the courts. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990). As the court below explained (Pet. App. 6a), although the "easiest" case for treating two nominally different employers "interchangeably" under the Act may be where one employer was created by the other to evade its obligations under the labor laws, that is not the only case in which the doctrine applies. Even "if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an existing collective bargaining agreement." *Id.* at 9a. The absence of an unlawful motive is not dispositive of the alter ego determination. See *id.* at 10a-11a.

The Third Circuit likewise has upheld the Board's position, that intent to evade legal obligations is not a necessary prerequisite for alter ego status, as "consistent with the purposes and policies of the Act." *Stardyne*, 41 F.3d at 148. As the court noted, "the Board's policy, which relies primarily on an examination of objective criteria, provides for easier

and more consistent application of the Act than one in which intent is an essential element," while it still permits "changes in ownership of employers without saddling the successor with collective bargaining agreements to which they did not agree." *Ibid.* (citing *NLRB* v. *Burns International Security Services*, 406 U.S. 272 (1972)). "In this way," the court concluded, "the Board's rule can be said to promote the Act's goal of encouraging the use of collective bargaining arrangements as a way to balance economic bargaining power." [9] *Ibid.*

Petitioners argue (Pet. 24) that, unless an intent to evade legal obligations is required, a company that is a mere successor employer under *NLRB* v. *Burns International Security Services*, *supra*, will be

---

[9] Other courts of appeals have similarly rejected the contention that a finding of improper subjective motive is a necessary prerequisite for alter ego status. See *NLRB* v. *Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir. 1986) ("If we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the [alter ego] doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business"); *NLRB* v. *Tricor Products, Inc.*, 636 F.2d 266, 269-270 (10th Cir. 1980) ("Whether a second employer is the *alter ego* of an earlier employer, or merely a successor employer, requires a consideration of numerous factors and often presents a close question"; "[t]here is no hard-and-fast rule"); *Goodman Piping Products, Inc.* v. *NLRB*, 741 F.2d 10, 12 (2d Cir. 1984) ("[T]he argument that the Board must find anti-union animus or an intent to evade union obligations before it can impose alter ego status is unpersuasive."). See also *Fugazy Continental Corp.* v. *NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984); *Carpenters Local 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983).

deemed to be the alter ego of the predecessor employer and, accordingly, will lose the freedom of a *Burns* successor to reject the substantive terms of the predecessor's labor contract. It is not necessary, however, to adopt an unlawful motivation rule in order to distinguish successor employers from alter egos. The essential distinction between a successorship and an alter ego relationship is that, in a successorship, a new employer takes over another employer's operations pursuant to a business transaction. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 43 (1987); *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973); *Burns*, 406 U.S. at 281. In an alter ego situation, the entity that exists both before and after the business transaction "is in reality the same employer." *Howard Johnson Co.*, 417 U.S. at 259 n.5. The Board's analysis of whether a second entity is a "new employer," or rather "in reality the same employer," calls for an objective evaluation. Although the presence of subjective motivation to evade the labor laws is an aid to that objective analysis, it is not essential to it.

Indeed, petitioners do not dispute that, under the "single employer" doctrine, two businesses may be treated as a unitary enterprise and the labor contract of one may be applied to the other. There is no valid reason for requiring a finding of subjective bad faith in order to hold the second business to the first's bargaining and labor contract obligations just because the latter has discontinued operations for economic reasons where, as here, there was "substantial * * * identity * * * between the two * * * along every axis" of the objective factors relevant to an alter ego determination. Pet. App. 11a.

3. Petitioners' principal contention (Pet. 16-17) is that the court of appeals' holding on alter ego status is in conflict with decisions of the Seventh, Eighth, and Ninth Circuits.

a. In *Trustees of Pension, Welfare & Vacation Fringe Benefit Funds of IBEW Local 701* v. *Favia Electric Co.*, 995 F.2d 785 (1993) (Pet. 16), the Seventh Circuit addressed claims that two nominally distinct employers should be found to be either a single employer or alter egos of one another. The court first affirmed the district court's finding that the single employer doctrine was inapplicable because, *inter alia*, "the two [employers] were not commonly owned." 995 F.2d at 788. The court held, however, that that fact did not preclude application of the alter ego doctrine, because an alter ego relationship could be found to exist "even though no evidence of actual common ownership was present." *Id.* at 789. The court then stated that "unlawful motive or intent are critical inquiries in an alter ego analysis." *Ibid.* Finding no such motive present on the facts of the case, the court held the alter ego doctrine inapplicable. *Ibid.*

In *Favia Electric*, the Seventh Circuit relied in part on its prior decision in *International Union of Operating Engineers, Local 150* v. *Centor Contractors, Inc.*, 831 F.2d 1309 (7th Cir. 1987). In *Centor*, the court reached an alternative holding that, because of "[p]articularly damning" evidence that the defendants stated that they were dissolving one firm and setting up another "to avoid their obligations to the Union," the two firms would be treated as alter egos of one another. *Id.* at 1314.

The Seventh Circuit's decisions do not directly conflict with the First Circuit's decision in this case. The decision in *Centor* establishes only that evidence

of an improper motive to avoid union obligations may in some cases be so strong that it compels a finding that the alter ego doctrine applies. That conclusion is entirely consistent with the First Circuit's recognition in this case that motivation is an "important factor" in the inquiry. Pet. App. 8a. In *Favia Electric*, the Seventh Circuit relied primarily on the absence of an antiunion motive in concluding that the alter ego doctrine did not apply. But the court did so only after finding that the requirements of the single employer doctrine—in particular, the requirement of common ownership—were not satisfied. In those circumstances, it is possible that alter ego status could not be found without some form of intent to avoid union obligations. That principle, however, even if correct, does not conflict with the First Circuit's conclusion in this case that wrongful motive is not *always* required and that, where "a substantial * * * identity exists between the two [employers] along every axis," Pet. App. 11a—including common ownership—the alter ego doctrine is applicable.

Our conclusion that the Seventh Circuit has not definitively resolved the question whether improper motive is a prerequisite to application of the alter ego doctrine is reinforced by two further considerations. First, in *Esmark, Inc.* v. *NLRB*, 887 F.2d 739 (1989), the Seventh Circuit expressly noted that "[t]here is some dispute whether 'an intent to evade' statutory obligations through corporate restructuring is a necessary element of an alter ego finding." *Id.* at 754 n.24. Neither in *Esmark* nor in any of its subsequent cases did the Seventh Circuit purport to take a firm and general position on the issue.[10]

---

[10] The Seventh Circuit in *Esmark* did discuss what it (mistakenly, in our view) believed to be the Board's doctrine in

Second, *Favia Electric* and *Centor* each discussed application of the alter ego doctrine in the context of a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, claiming that a change in corporate form did not excuse an employer from a breach of its obligations under a labor contract; consequently, the Board was not a party in either of those cases. It is therefore unclear what position the Seventh Circuit would take concerning application of the alter ego doctrine in reviewing a Board determination in a case in which it had the full benefit of the Board's views on the subject. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990) (Board's rules entitled to deference).

---

this area. See 887 F.2d at 754; see also *Favia Electric*, 995 F.2d at 788 (quoting *Esmark*). However, the court's discussion was dicta, because the Board's theory of liability in that case was not based on an alter ego theory, but rather on the theory that the corporate veil between a parent and subsidiary corporation should be pierced. In cases involving the alter ego doctrine as applied by the Board, the Seventh Circuit has appeared to recognize the multi-factor nature of the analysis and has not suggested that a finding of improper motivation is necessary. For instance, in *NLRB* v. *Bell Co.*, 561 F.2d 1264 (7th Cir. 1977), the court explained that a finding of alter ego status may be founded upon "control or ownership of a new business by the prior owners of an old business." An alternative basis for finding the existence of a "disguised continuance," the court observed, exists "where the new business '. . . allows itself to become a substitute * * * serving to * * * evad[e] the consequences of the unfair labor practices committed.'" *Id.* at 1268 n.4 (quoting *NLRB* v. *Ozark Hardwood Co.*, 282 F.2d 1, 5 (8th Cir. 1960)). See also *NLRB* v. *Dane County Dairy*, 795 F.2d 1313, 1322 (7th Cir. 1986) (stating that "[c]ommon control of nominally distinct entities establishes alter ego status").

b. Likewise, the Eighth Circuit has not held that unlawful motive is a prerequisite to a finding of alter ego status. In *Crest Tankers, Inc.* v. *National Maritime Union*, 796 F.2d 234 (8th Cir. 1986) (Pet. 16), the court discussed the differences between the single employer and alter ego doctrines, holding that inquiry into motivation is not necessary to application of the single employer doctrine, but is "[a] critical part of the inquiry into alter ego status." 796 F.2d at 237. That conclusion is correct, since both the Board and the courts have recognized that motivation must be taken into account in determining whether to apply the alter ego doctrine. The court did not hold, nor did the district court on remand understand the court to have held, that unlawful intent is required for a finding of alter ego status. See *Crest Tankers, Inc.* v. *National Maritime Union*, 665 F. Supp. 1431, 1434-1435 (E.D. Mo. 1987) ("anti-union animus may be considered * * * [but] no single factor [is] dispositive"), appeal dismissed, 871 F.2d 1092 (8th Cir. 1988) (Table). Indeed, the Eighth Circuit indicated in a footnote that it did not disagree with a Sixth Circuit decision holding that improper intent is "not essential * * * to imposition of alter ego status." See 796 F.2d at 238 n.2. And in other decisions the Eighth Circuit has indicated that unlawful intent is not a necessary prerequisite to alter ego status. See, *e.g.*, *Woodline Motor Freight, Inc.* v. *NLRB*, 843 F.2d 285, 288 (1988) ("whether the change in operations is unlawfully motivated" is a "[f]actor[] to be considered").[11]

---

[11] Accord *NLRB* v. *Campbell-Harris Electric, Inc.*, 719 F.2d 292, 295-296 (8th Cir. 1983) (finding alter ego status based upon shared business purpose, mode of operation,

c. The Ninth Circuit decisions cited by petitioner (Pet. 17) also do not conflict with the First Circuit's decision in this case. It is true that the Ninth Circuit has indicated that a finding of improper motivation accompanies application of the alter ego doctrine. In *A. Dariano & Sons, Inc.* v. *District Council of Painters No. 33*, 869 F.2d 514 (9th Cir. 1989), the court stated that "[i]n all alter ego determinations an element of fraud or misrepresentation also exists." *Id.* at 519. See also *UA Local 343* v. *Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1472 (9th Cir. 1994) (relying on *A. Dariano* to make the same point). Neither of those decisions, however, firmly establishes a conflict in the circuits on the issue.

First, as with the Seventh Circuit's decisions in *Favia Electric* and *Centor*, the Ninth Circuit's statement in *A. Dariano* was made without the benefit of the Board's participation in that case and was based on the mistaken belief that, under Board law, "[t]he NLRB obviously conceptualizes the alter ego test on the * * * theory of a trustee *ex maleficio* to

---

method of supervision, equipment, customers, and substantial identity of ownership and management); *NLRB* v. *Ozark Hardwood Co.*, 282 F.2d 1, 7 (8th Cir. 1960) (alter ego status may be based upon sufficient "identity of business structure and interest * * * [o]r alternatively [where the new corporation] represent[s] an instrument of cooperation and evasion as to the labor-wrongs situation" of the old employer). Nor is *Iowa Express Distribution, Inc.* v. *NLRB*, 739 F.2d 1305 (8th Cir.), cert. denied, 469 U.S. 1088 (1984) (Pet. 17), to the contrary. There, the court found that, while there was "significant evidence" suggesting that the two entities involved were not alter egos, other objective evidence, taken together with evidence of unlawful motive, supported the General Counsel's position that the companies were alter egos. 739 F.2d at 1311-1312.

pierce the changed legal title and format of the successor." 869 F.2d at 518. It is unclear whether the Ninth Circuit would take a similar view if it were accurately informed of the Board's views on the subject.

Moreover, again as with the allegedly conflicting Seventh Circuit decisions, the Ninth Circuit's focus on unlawful intent in *A. Dariano* and *Nor-Cal Plumbing* may reflect the fact that both cases arose in a factual context in which evidence of the employer's motivation may be particularly important. Both *A. Dariano* and *Nor-Cal Plumbing* involved application of the doctrine to "double breasted" employer operations. In that setting, "[the] concern [is] that some contractors would use double-breasted operations *to avoid their collective bargaining obligations*," and the alter ego doctrine serves "to guard against such abuse." *Nor-Cal Plumbing*, 48 F.3d at 1469-1470 (emphasis added). Even if a finding of improper motivation were a prerequisite to application of the doctrine in that setting, however, it does not follow that it is a prerequisite in all possible contexts or, in particular, in the very different setting in which this case arose.

Finally, the Ninth Circuit has indicated in other cases that unlawful intent is not a necessary prerequisite of alter ego status. The court has stated that "the determination that one entity is merely another's alter ego will depend *to some extent* on whether or not the transfer of assets or the dissolution of the old entity is motivated by union animus." *Haley & Haley, Inc.* v. *NLRB*, 880 F.2d 1147, 1150 (1989) (emphasis added); accord *NLRB* v. *O'Neill*, 965 F.2d 1522, 1529 (1992), cert. denied, 113 S. Ct. 2995 (1993). See also *J.M. Tanaka Construction*,

Inc. v. *NLRB*, 675 F.2d 1029, 1033 (1982). Until the Ninth Circuit arrives at a firm position on the issue, it cannot be said that its position conflicts with that of the First Circuit in this case.

d. Petitioners are also mistaken in suggesting (Pet. 16) that the decision below is "inconsistent" with decisions of the Fourth Circuit. In *Alkire* v. *NLRB*, 716 F.2d 1014 (1983) (Pet. 18), the Fourth Circuit explained that, where "substantially the same entity controls both the old and new employer," the court will then inquire "whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations." 716 F.2d at 1020. That test, however, does not establish a requirement that the alleged alter ego entity must have been created for the purpose of evading the labor laws. Indeed, as the Fourth Circuit emphasized in a subsequent decision, "[t]he imposition of alter-ego status under *Alkire* does not hinge on proof that the employer intended to evade the labor laws." *NLRB* v. *McAllister Brothers, Inc.*, 819 F.2d 439, 445 n.14 (1987).[12]

---

[12] Petitioners are also mistaken in suggesting (Pet. 20 n.16) that the commentators are divided into hostile camps on the issue whether unlawful intent is a necessary prerequisite to alter ego status. Two commentators reject that view. See Note, 86 Mich. L. Rev. 1024, 1054 (1988); S. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 Wisc. L. Rev. 67, 103. Neither of the other writers cited by petitioners appears to argue for a rule making unlawful intent a necessary prerequisite. See Note, 54 N.Y.U. L. Rev. 624, 638 (1979) (observing that "the employer's motivation for the business change is an *important* element of the alter ego analysis") (emphasis added); F. Slicker, *A Reconsideration of the Doc-*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

JULY 1995

---

trine of Employer Successorship—A Step Toward a Rational Approach, 57 Minn. L. Rev. 1051, 1064 (1973) (noting that alter ego cases "*include*[] situations in which a technical change in employer identity is merely incident to * * * that employer's union animus or an unlawful motive to avoid the commands of national labor laws") (emphasis added).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20091